

LIM EH FAH & ORS**a****v.****SERI MAJU PADU**

HIGH COURT MALAYA, SHAH ALAM

b

SURIYADI HALIM OMAR J

[CIVIL APPEAL NO: MT(3) 11-3-1999]

12 JULY 2002

LAND LAW: *Housing developers - Damages for late delivery - Agreement to deliver vacant possession within 24 months - Date of vacant possession - Whether time to commence from date of acceptance of deposit - Whether contract deemed to have existed on receipt of deposit*

c

On 17 July 1992, the first appellant paid a deposit for a condominium to the respondent who was a developer, and on 10 October 1992 entered into a sale and purchase agreement with the respondent pertaining to the said property. It was a term in the agreement that the respondent was to deliver vacant possession within 24 months failing which the respondent would pay the appellant liquidated damages. According to the appellant, this 24-month period commenced from 17 July 1992 and ended on 17 July 1994 but vacant possession was only delivered on 1 December 1996. Thus, for the purpose of assessing damages for late delivery as per the sale and purchase agreement, the time period should be from 17 July 1994 to 1 December 1996. The respondent argued that the damages ought to be calculated from 12 June 1993 instead, *ie*, the date the deed of assignment was signed.

d**e****f**

The appellant applied to the magistrate for a summary judgment in seeking the said damages but the application was dismissed. Hence, this appeal. Similar claims were forwarded by two others who shared the same fate as the first appellant and the decision by this court would bind them as well.

Held:**g**

[1] The purpose of a deposit is to indicate offer and acceptance, each with its respective responsibilities that must be fulfilled in accordance with the provisions of the sale and purchase agreement. Accordingly, the respondent was obligated to build, deliver and hand over vacant possession within the agreed period to the appellants. (p 41 h & i)

h**i**

- a* [2] The respondent assumed the responsibility to fulfil its part of the bargain at the date the deposit was paid, ie, being 17 July 1992, in effect being the date when the contract was struck, and not the date the deed of assignment was signed. For otherwise, the respondent could arbitrarily choose any date it favoured to execute the sale and purchase agreement which would certainly prejudice the purchaser. (pp 40 f & 41 d-e)
- b*
- [3] As the respondent had failed to deliver vacant possession to the first appellant on 17 July 1994 but had only done so on 1 December 1996, the claim for the damages was upheld and the summary application was allowed under O. 26A of the Subordinate Courts Rules 1980. There were
- c* no triable issues to warrant a full hearing. (p 40 e)

[Appeal allowed with costs.]

Case(s) referred to:

- Faber Union Sdn Bhd v. Chew Nyat Shong & Anor* [1995] 3 CLJ 797 (*fol*)
- d* *Hoo See Sen & Anor v. Public Bank Bhd* [1988] 1 CLJ 768; [1988] 1 CLJ (Rep) 125 (*fol*)

Legislation referred to:

Housing Developers (Control and Licensing) Regulations 1989, reg. 11(2)
Subordinate Courts Rules 1980, O. 26A

- e* For the appellants - MS Ong; M/s Raja Eleena Siew Ang & Assoc
For the respondent - Jegathesan; M/s C Jegathesan

Reported by M Maheswaran

JUDGMENT

- f*
- Suriyadi Halim Omar J:**

- Three appeals were filed by the purchasers (hereinafter referred to as the appellants) of immoveable properties called the Desa Maju Padu Condominium, Kota Bharu, Kelantan from the developer defendant. The appeals came about
- g* as the learned magistrate, had dismissed the purchasers' summary judgment applications, pursuant to O. 26A of the Subordinate Courts Rules 1980. The appellants had claimed damages against the respondent defendant for late delivery of the immovable properties bought by them. The factual matrix further revealed that the appellants had much earlier filed three separate
- h* actions, later to be consolidated. For easy appreciation of this consolidated matter, I will concentrate on the appeal of the first appellant, the outcome of which will bind the other two cases.

- i*

To reiterate, the first appellant had bought one unit of the condominium at a cost price of RM75,300. Pursuant to that transaction he had deposited RM7,530, being 10% of the purchase price, to the respondent on 17 July 1992. About three months later ie, on 10 October 1992 the first appellant executed a sale and purchase agreement (hereinafter referred to as the S&P agreement), with the respondent pertaining to that impugned unit.

It was agreed upon by the respondent that vacant possession would be handed to the first appellant within twenty-four months from the date of the S&P agreement. In the event of any delay in the delivery of the relevant unit to the appellant, the respondent was to pay damages to the tune of 10% per year of the value of the unit. By virtue of a loan agreement and a deed of assignment, signed on 12 June 1993 the first appellant had assigned his rights and interest over the impugned property to the fifth appellant (the bank).

In response to the statement of claim, the respondent in its defence had alleged that countdown in the handing over of the property, should begin on or before 12 June 1993 and not any other dates. That being so, the respondent had asserted that it had fulfilled its part of the bargain within the stipulated time, except for the fixing of the septic tank and the piping system, which were outside its control.

The first appellant in retort had alleged that the respondent was contracted to hand over vacant possession on or before 17 July 1994, but as delivery of vacant possession took place only on 1 December 1996, involving a delay of 868 days, he was thus entitled to damages to the tune of RM17,906.96.

The legal poser before me, for purposes of determining the date of vacant possession in a claim for liquidated damages, was whether it was the day the deposit was accepted, the day the S&P agreement was executed or when the deed of assignment was signed.

Counsel for the first appellant ventilated that the relevant date had to be the date the deposit was paid to the respondent, which was 17 July 1992 with vacant possession to take place on, or before 17 July 1994 (24 months). The respondent submitted 12 June 1993 ie, the deed of assignment date, on the premise that the S&P agreement had to be read with the former. It further submitted that the first appellant could not have carried out payments in accordance with the schedule, as he had yet to obtain the financial support to finance his purchase. That being so the appellant could only comply with the conditions of payments, only after he had managed to obtain a loan from the fifth appellant, which was the bank. On those grounds, the respondent contended that 12 June 1993 must invariably take center stage.

- a* To really appreciate the issue at hand, it is quite imperative that I lay down certain portions of the S&P agreement, in particular those found at pp. 40 to 87:
- i) Clause 7 – Time shall be the essence of the contract in relation to all provisions of this agreement.
- b* ii) Clause 22(1) – The said parcel should be completed by the developers and vacant possession with the connection of water and electricity supply to the said parcel shall be handed over to the purchaser within twenty four (24) calendar months from the date of this agreement.
- c* iii) Clause 22(2) – If the developer failed to hand over vacant possession of the said parcel together with connection of water and electricity supply to the said parcel in time the developer shall pay immediately to the purchaser liquidated damages to be calculated from day to day at the rate of ten per centum (10%) per annum of the purchase price.
- d* iv) Clause 23(2) – Upon the expiry of fourteen (14) days from the date of a notice from the developers requesting the purchaser to take possession of the said parcel, whether or not the purchaser has actually entered into possession or occupation of the said parcel, the purchaser shall be deemed to have taken delivery of vacant possession.
- e* Having heard the submissions of the appellant and the respondent, and having intensely scrutinised the record of appeal, I was satisfied that no triable issue existed which warranted a full hearing. Based on that view I allowed the appeal and accordingly allowed the summary application under O. 26A of the Subordinate Court Rules 1980. I now supply my reasons.
- f* As regards the date to take into consideration for purposes of calculating the damages on the late delivery of vacant possession, I concluded it to be 17 July 1992, ie, the date when the deposit was paid, and not the date of the deed of assignment. To support my findings, I seek solace from the case of
- g* *Faber Union Sdn. Bhd v. Chew Nyat Shong & Anor* [1995] 3 CLJ 797, which factually was on all fours with the current case. There a purchaser had bought a unit of property from the developer (appellant). A deposit was paid on 17 February 1984 with the agreement being signed on 27 June 1984. The developer failed to deliver the impugned property within the agreed thirty-six months, whereupon the buyer claimed liquidated damages. Following an earlier
- h* case of *Hoo See Sen & Anor v. Public Bank Bhd* [1988] 2 MLJ 170, the Supreme Court had decided that the relevant date for ascertaining when time started to run to be when the booking fee was paid. Under held it is clearly authored:
- i*

For the purpose of ascertaining the date of delivery of vacant possession, the relevant date when time started to run was the date on which the purchaser paid the booking fee, and not the date of signing of the sale and purchase agreement.

a

Despite the submission that the appellant could only commence paying pursuant to cl. 4(1) of the S&P agreement, only after having received financial backing from the fifth appellant (the bank) and a deed of assignment having been executed, hence the assertion that time began to run on 12 June 1993, I found that argument unacceptable. Apart from the above case of *Faber Union Sdn Bhd* being crystal clear, in the event of the appellant failing to adhere to the schedule of payment, there was nothing to stop the respondent from imposing interest on the late payments. This right is sufficiently provided for under cl. 8 of the S&P agreement. Any failure on the part of the appellant, if any, to comply with cl. 4, did not extinguish the responsibility of the respondent to fulfil the contract within the stipulated time.

*b**c*

One must bear in mind that the date of 17 July 1992 ie, the deposit payment date, was the date when the contract was struck, and the very date the respondent assumed responsibility to fulfil its part of the bargain. If the date of the signing of the S&P agreement were to be taken as the relevant date, when time started to run for the delivery of the vacant possession, the respondent could willy-nilly pick any dates it favoured to execute the S&P agreement, which would certainly prejudice the interest of the purchaser.

*d**e*

Under the Housing Developers (Control And Licensing) Act 1966 (Act 118) & Regulations 1989 & 1991, reg. 11(2) reads:

No housing developer shall collect any payment by whatever name called except as prescribed by the contract of sale.

f

In relation to this case, the above provision explicitly means that the respondent was permitted to accept deposits so long as it was provided for under the S&P agreement. A reading of the receipt, found at p. 39 of the Record of Appeal, highlighted that the payment was a 'deposit on apartment No. 6, Floor 2, Kampong Cina, Kota Bharu, Kelantan.' What is the purpose of a deposit if not to indicate offer and acceptance, each with its respective responsibilities that must be fulfilled in accordance with the provisions of the S&P agreement. The main obligation of the appellant was to pay in full the purchase price of the impugned property (cl. 4), failing which interest may be imposed on any late payments. At the other end of the agreement, it was the duty of the respondent to build, deliver and to hand over vacant possession within the agreed period to the appellant, failing which liquidated damages at the rate of 10% per annum of the costs of the property must be paid to the appellant.

*g**h**i*

a Based on the above reasons I concluded that the respondent had failed to live up to its bargain to deliver vacant possession within 24 months, as indicated in the notice of 17 November 1996 (pp. 132 and 133 of the record of appeal).

b Evidentially, pursuant to cl. 23(2) of the S&P agreement, the date of handing over was supposed to be 17 July 1994, there was a delay of 868 days (from 17 July 1994 until 1 December 1996). As I had concluded that there was no merit to the defense of the respondent, I thereupon allowed the appeal with costs, and accordingly granted the summary judgment application.

c

d

e

f

g

h

i